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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1976

No. 76-5729

MARK DAVID OLIPHANT and DANIEL B. BELGARDE,
Petitioners,

v.

THE SUQUAMISH INDIAN TRIBE, et al., *Respondents*.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR AMICUS CURIAE ATTORNEY GENERAL, STATE OF WASHINGTON

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INDEX

Page

INTEREST OF AMICUS CURIAE..... 1

SUMMARY OF ARGUMENT..... 6

ARGUMENT 8

I. THE LIMITED FUNCTION OF "TRIBAL SOVEREIGNTY" AS APPLIED BY THIS COURT 8

II. THE DISTINCTION BETWEEN TRIBAL SOVEREIGNTY AND TRIBAL SELF-GOVERNMENT 17

III. THE JUDICIAL FOUNDATION OF PLENARY CONGRESSIONAL POWER OVER INDIANS IN WORCESTER V. GEORGIA AND THE CONGRESSIONAL EXERCISE OF THAT POWER IN PRESERVING LIMITED TRIBAL SELF-GOVERNMENT 24

IV. CONSTITUTIONAL BILL OF RIGHTS..... 28

CONCLUSION 30

TABLE OF AUTHORITIES

TABLE OF CASES

Confederated Bands and Tribes of Yakima Indian Nation v. Washington, 550 F.2d 443 (1977)..... 5

Draper v. U.S., 164 U.S. 240 (1896).....4, 19

Ex parte Kenyon, 14 Fed. Cas. 353 (C.C.W.D. Ark.) (1878) 30, 31, 2A

Fisher v. District Court, 424 U.S. 382 (1976).....15, 16, 17

McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973) 9, 10, 17, 26

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 9, 10, 17

Morton v. Mancari, 417 U.S. 535 (1974) 11, 12, 13, 15, 16, 17, 26

New York ex rel. Ray v. Martin, 326 U.S. 496 (1946) 4, 20

Organized Village of Kake v. Egan, 369 U.S. 60 (1962) 2

Puyallup Tribe, Inc. v. Dept. of Game of the State of Washington, ____ U.S. ____, 97 S. Ct. 2616 (1977)..... 4

Reid v. Covert, 354 U.S. 1 (1957).....28, 29, 30, 31

Talton v. Mayes, 163 U.S. 376 (1896)..... 28

TABLE OF CASES—Cont.

Page

The Cherokee Nation v. Georgia, 30 U.S. 1 (1831) 24
U.S. v. Antelope, ... U.S. ....., 51 L. Ed. 2d 701 (1977) 13, 14, 15, 17
U.S. v. Kagama, 118 U.S. 375 (1886) 6, 8, 9, 15, 22, 31
U.S. v. McBratney, 104 U.S. 621 (1882) 4, 19
U.S. v. Mazurie, 419 U.S. 544 (1975) 12, 13, 15, 17
U.S. v. Quiver, 241 U.S. 602 (1916) 21
U.S. v. Washington, 496 F.2d 620 (9th Cir. 1974) 4
Worcester v. Georgia, 31 U.S. 515 (1832) ...10, 12, 13, 24, 25, 26

CONSTITUTION AND STATUTES

Article I, § 8, U.S. Const. 25
Article III, § 2, U.S. Const. 24
18 USC 1153 .....8, 14
18 USC 1154 13
18 USC 1161 13
25 USC 476 .....15, 16
12 Stat. 927 (Treaty of Point Elliott) 23
48 Stat. 984—Indian Reorganizaion Act 7, 11, 26
86 Stat. 111—1972 Equal Employment Opportunity Act... 11
Public Law 83-280 .....4, 5
Public Law 90-284 .....27, 28
Ch. 240 Laws of 1957 (Wash.) 4
Ch. 36 Laws of 1963 (Wash.) 5

TEXTS AND OTHER AUTHORITIES

AGO 63-64 No. 68 5
AGO 1972 No. 9 4
7 Op. A.G. 174 (1855) 23
114 Cong. Rec. 9111 27
114 Cong. Rec. 9596 27
Handbook on Federal Indian Law (Cohen) 17, 18
77 I.D. 113 .....22, 23, 1A-5A
78 I.D. 229 22
Indian Civil Rights Act 7
70 Mich. Law Rev. 955 27
51 N.D. Lawyer 600 27
1968 U.S. Code Cong. & Ad. News 1864 27
Wheeler-Howard Indian Reorganization Bill (HR 7902, S 2755, S 3645) (1934) 26

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BRIEF FOR AMICUS CURIAE ATTORNEY GENERAL, STATE OF WASHINGTON

INTEREST OF AMICUS CURIAE

The Attorney General is the chief legal officer of the State of Washington and is participating as amicus curiae because of the substantial impact of the decisions below upon the State of Washington and its citizens. The courts below have concluded that an Indian tribe has all the powers of a sovereign except as restricted by Congress and thus has the authority to criminally charge and try non-Indians

in tribal court for violations of tribal laws. The majority of the three-member panel of the circuit court reached this conclusion by characterizing Indian tribes as governmental entities having all the sovereign powers of a state or the federal government over all persons within a reservation, Indian and non-Indian alike, except to the extent such powers are expressly limited by Congress.

As Justice Frankfurter noted, in *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) at page 72:

> "As the United States spread westward, it became evident that there was no place where Indians could be forever isolated."

The accuracy of that statement is dramatically presented in the State of Washington. The Port Madison Indian Reservation, upon which the events giving rise to this litigation occurred, is reasonably typical of the twenty-three Indian reservations in the State of Washington. By air or water, it is within ten miles of the city of Seattle, the state's largest city, with a population in excess of one-half million. The reservation consists of 7,275 acres, of which 63% is privately owned in fee simple absolute, free of any trust held by the United States. Only approximately 1% is tribally owned, and the remaining 36% remains in allotment status with the patent held in trust by the United States. The population of the Port Madison Indian Reservation is 2,928, of which only about 50, approximately one-sixtieth of the population, are members of the Suquamish Tribe. The total tribal

membership is unknown, but it is estimated to be approximately 150, of whom, as we have noted, only 50 live within the reservation.

Within the Port Madison Indian Reservation and the other twenty-two reservations in the State of Washington, thousands of the state's non-Indian citizens reside; and many are employed by businesses located within the reservations. Most of them occupy property which either they have purchased themselves or have acquired from their ancestors. They have acquired homes and created cities within these reservations. For example, the Yakima Reservation, which is located east of the Cascade Mountains, has two cities with populations in excess of 3,000 people within the reservation (Wapato — 3,050 and Toppenish — 6,000). These citizens are not transients, consenting to jurisdiction by temporary presence within an area. These resident citizens are not permitted to participate in the formulation of tribal law, nor do they have any say in the tribal policies, nor in the enforcement and adjudication of tribal ordinances. These citizens, in light of established living patterns, cannot avail themselves of the opportunity "like a tourist" to simply avoid a jurisdictional area.

Nineteen of these reservations are located in Western Washington, which is the population center of our state. Some of these reservations are located within or near large urban areas. For example, the original boundaries of the Puyallup Reservation in-

clude a substantial portion of the city of Tacoma, the state's second largest city.[1]

The State of Washington for a number of years, under the authority expressed by this Court in *U.S. v. McBratney*, 104 U.S. 621 (1882); *Draper v. U.S.*, 164 U.S. 240 (1896); and *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946), has exercised criminal jurisdiction over non-Indians who commit crimes against the person or property of other non-Indians within the Indian reservations of this state. More recently, in response to the Congressional authorization in Public Law 83-280 permitting the state to assume jurisdiction over Indian reservations, we have enacted chapter 240, Laws of 1957. That act provides that upon the petition of the governing body of the tribe the state will assume full jurisdiction to the extent authorized by Public Law 280. In response to that federal and state legislation, nine[2] tribes petitioned for, and the state accepted and has

[1]The original Puyallup Reservation encompassed some 18,000 acres of which all but approximately 33 have been transferred to non-Indian ownership. While the Ninth Circuit Court of Appeals resurrected the reservation, there remains the unsettled question as to whether the original boundaries are still intact or whether the reservation may have been diminished in size. See, *U.S. v. Washington*, 496 F.2d 620 (9th Cir. 1974), cert. den. 419 U.S. 1032, and *Puyallup Tribe, Inc. v. Dept. of Game of the State of Washington*, ... U.S. ....., 97 S. Ct. 2616, 2621, fn 11 (June 23, 1977).

[2]Two of the tribes which originally petitioned for jurisdiction under the 1957 act subsequently requested and the governor granted proclamations of retrocession which were thereafter accepted by the federal government. For those two tribes, the Quinault and the Suquamish, the state's jurisdiction is exercised pursuant to the 1963 state jurisdictional act. The Governor of the State of Washington does not have the power to retrocede jurisdiction but may correct an error in the original proclamation assuming jurisdiction, AGO 1972 No. 9 (April 17, 1972). The "retrocession" of jurisdiction over the Quinault was for the correction of an error, but no error was involved with acquisition of jurisdiction over the Suquamish. Therefore, as a matter of state law, the Governor could not legally retrocede jurisdiction over the Suquamish Port Madison Reservation.

exercised, full jurisdiction. Subsequently, in 1963 the Washington state legislature enacted chapter 36, Laws of 1963, whereby the state undertook the responsibility for *full jurisdiction without the necessity of petition by the governing body of the tribe for all non-Indians within the boundaries of a reservation.* Further, the state commenced the exercise of full and complete jurisdiction over tribal members for the purposes of compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children, and operation of motor vehicles upon the public streets, alleys, roads and highways. The state also assumed complete and full jurisdiction over tribal members for all other purposes within the reservation except for acts that occurred on tribal or allotted lands.

Pursuant to both the state 1957 and 1963[3] acts, which were authorized by Congress (Public Law 83-280), the State of Washington has consistently exercised full and complete jurisdiction over all non-Indian acts that occur within the Indian reservations in this state. This assumption of jurisdiction has been a matter of exclusive jurisdiction as is reflected in the Washington Attorney General Opinion, AGO 63-64 No. 68 (November 8, 1963).

[3]An appeal is currently pending with this Court from the Ninth Circuit determination in *Confederated Bands and Tribes of Yakima Indian Nation v. Washington*, 550 F.2d 443 (1977), wherein the Ninth Circuit invalidated the state's exercise of jurisdiction pursuant to Public Law 83-280 by this 1963 state enactment.

SUMMARY OF ARGUMENT

We have examined the complete, thorough and comprehensive briefs of the petitioners and the amicus curiae, Kitsap County. We concur, support and endorse the arguments set forth therein, and our arguments in this brief will seek to avoid duplication and repetition. We emphasize that the absence of such duplication does not reflect disagreement with the position set forth in those briefs.

As a description of the present legal status of Indian tribes, the term "tribal sovereignty" is a legal misnomer. Under our system of government, there are only two types of true sovereigns, the federal government and the states. *U.S. v. Kagama*, 118 U.S. 375 (1886).

As a description, however, of the past status of Indian tribes, the concept of tribal sovereignty retains vitality; for it establishes the basis for the special relationship between Indians and the federal government which validates otherwise constitutionally objectionable special treatment of Indians by the federal government, but that is all it does. The concept does not, independently of federal statutes or treaty provisions, provide a valid basis for any assertion of tribal jurisdiction over non-Indians.

Moreover, the "sovereignty" which the tribes historically have exercised was purely personal rather than territorial in scope; i.e., it was limited to tribal members and thus amounted to what is best described as "tribal self-government," and not "tribal

sovereignty." The fundamental error of the majority opinion of the court below was to overlook this distinction.

The pattern of Congressional action in this century, as established by the Indian Reorganization Act in 1934 and the Indian Civil Rights Act of 1968, was premised on this distinction. Congress has not only refused to confer upon Indian tribes criminal jurisdiction over non-Indians, but it has acted upon the assumption that no such jurisdiction exists.

Should this Court find that such jurisdiction exists, the exercise of it by Indian tribal courts would violate fundamental constitutional rights of non-Indians.

ARGUMENT

I.

THE LIMITED FUNCTION OF "TRIBAL SOVEREIGNTY" AS APPLIED BY THIS COURT

In the absence of Congressional authorization the concept of "tribal sovereignty,"[4] as developed and applied by this court, does not provide any basis for the assumption of criminal jurisdiction by an Indian tribe over non-Indians. The sole function of the concept is to provide a basis for validating federal statutes which grant special treatment to Indians, including those federal statutes which confer upon Indian tribes the authority to regulate the conduct of non-Indians. Because no federal statute or treaty provision exists which authorizes the Suquamish Tribe's assertion of jurisdiction over non-Indians, such jurisdiction does not exist in this case.

In *U.S. v. Kagama*, 118 U.S. 375 (1886), this Court upheld the validity of the Major Crimes Act (now codified as 18 USC 1153) against the contention that it violated Indian tribal sovereignty. *Kagama* presented the strongest possible case for the claim of tribal sovereignty since it involved the murder of an Indian by two other tribal members within the boundaries of the Hoopa Valley Indian Reservation. In rejecting the claim, this Court stated:

"But these Indians are within the geographical

[4]See, infra at pp. 17-23 for a discussion of the distinctions between tribal self-government sometimes referred to as "tribal sovereignty" as contrasted with the traditional sense of "sovereignty."

> limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. *There exist within the broad domain of sovereignty but these two.* There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from or exist in, subordination to one or the other of these. * * *" (Emphasis supplied) (*Supra* at 379)

What vitality remains, then, in the concept of "tribal sovereignty"? As shown by *Kagama, supra*, it cannot be used as a shield to ward off assertions of criminal jurisdiction over Indians by the federal government. Can it be used as a sword to reach non-Indians; i.e., to support, independently of any federal authorization, an assertion of tribal criminal jurisdiction over non-Indians? We submit that it cannot.

The concept has been invoked often as a shield to ward off assertions by the states of jurisdiction over Indians. Two recent instances are *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). In the former case, involving an assertion of state taxing jurisdiction over an Indian on the Navajo Reservation, the tax was held invalid. In the latter case, involving an assertion of state taxing jurisdiction over the off-reservation activities of an Indian tribe, the tax was sustained.

Notwithstanding the differences in result in those cases, the same approach was taken. The legal analysis by this Court focused on specific treaty pro-

visions and statutes, not on general amorphous concepts of "tribal sovereignty." This is reflected by the following quotation from *Mescalero:*

> [W]e reject * * * the broad assertion that the Federal Government has exclusive jurisdiction over the Tribe for all purposes and that the State is therefore prohibited from enforcing its revenue laws against any tribal enterprise "[w]hether the enterprise is located on or off tribal land." Generalizations on this subject have become particularly treacherous. The conceptual clarity of * * * Marshall's view in *Worcester v. Georgia*, * * * has given way to more individualized treatment of particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together, affect the respective rights of States, Indians, and the Federal Government. 411 U.S. (Supra at 147, 148.)

The same sentiments were expressed even more bluntly in McClanahan:

> [T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption. * * * The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power. (411 U.S. at 172.)

This Court noted that Indian sovereignty as a doctrine was relevant only as a "backdrop" against which treaties and statutes must be read. (411 U.S. at 172) Federal preemption of the field was such that the issue of residual Indian sovereignty was moot and "generally of little more than theoretical importance. * * *" (411 U.S. at 172, note 8)

Even as a shield to be used against the state, "platonic notions" of "tribal sovereignty" retain little, if any, vitality.

The concept retains, however, considerable vitality in another area. It forms the basis for fending off attacks, generally mounted on constitutional grounds such as the equal protection clause, as incorporated by the due process clause, against federal legislation granting special treatment to Indians. This is shown by four recent decisions of this Court involving such attacks. The first is *Morton v. Mancari*, 417 U.S. 535, (1974), in which this Court referred to Indians as "* * * members of *quasi*-sovereign tribal entities. (*Supra* at 554)

The 1934 Indian Reorganization Act (48 Stat. 984) provided an employment preference for Indians in the Bureau of Indian Affairs. That preference was challenged as being contrary to the 1972 Equal Employment Opportunity Act (86 Stat. 111) and as violating the equal protection component of the due process clause. After rejecting the contention that the 1934 employment preference had been repealed by implication by the 1972 act, this Court then considered the constitutional challenge.

> "Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an en-

> tire Title of the United States Code (25 USC) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." (*Supra* at 552)

This Court then proceeded to identify the rationale which validates such federal laws including the employment preference with the BIA:

> "The preference, as applied, is granted to Indians not as a discreet racial group, but, rather, as members of *quasi*-sovereign tribal entities whose lives and activities are governed by the Bureau of Indian Affairs in a unique fashion." (*Supra* at 554) (Emphasis supplied)

It is important to note that in referring to "tribal sovereignty" as the basis for validating the federal action this Court's observation was that tribal entities are *quasi*-sovereign, not purely "sovereign" entities.

A second recent occasion upon which this Court has considered similar attacks is *U.S. v. Mazurie*, 419 U.S. 544 (1975), in which this Court, expressly hearkening back to *Worcester v. Georgia*, 31 U.S. 515 (1832), stated:

> "* * * Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory * * *" (419 U.S. at 557)

But again we must examine the precise role which the concept of sovereignty played in the case.

Mazurie, a non-Indian, was convicted in federal court of introducing spirited beverages into Indian country (the Wind River Reservation, Wyoming) in

violation of 18 USC 1154. In 1953, Congress had passed local option legislation allowing Indian tribes, with the approval of the Secretary of the Interior, to regulate the introduction of liquor into Indian country so long as state law was not violated (18 USC 1161). Mazurie operated the Blue Bull Bar which, although within the reservation, was located on land owned in fee by non-Indians. The tribe had denied a renewal of Mazurie's license, but he continued to sell without it.

He was tried and convicted for a violation of 18 USC 1154. The Court of Appeals for the Tenth Circuit reversed the conviction. 487 F.2d 14 (1973). The reversal was based on the conclusion that "* * * the purported delegation of authority to the tribal officials contained in 18 U.S.C. § 1161 * * *" was invalid. 487 F.2d at 19. In so holding, the circuit court referred to the Wind River Tribes as a "private, voluntary organization, which is obviously not a governmental agency * * *" Ibid. This Court recognized that this characterization of the tribes was the heart of the rationale of the Court of Appeals' decision. 419 U.S. at 557. But in citing *Worcester, supra*, this Court characterized the tribes as more than private, voluntary organizations, and thus found a sufficient basis to sustain the Congressional delegation of power to the tribes.

Most recently, in *U.S. v. Antelope*, ... U.S. ..... 51 L. ed 2d 701 (1977), this Court, relying upon the language quoted from *Mancari* and *Mazurie*,

sustained the validity of the Major Crimes Act, 18 USC 1153, against an argument that it racially discriminated against an Indian who had committed murder on a reservation located within the State of Idaho. When the defendant, Antelope, was convicted in federal court, he was subject to the felony murder rule. The State of Idaho does not as a matter of state law have the felony murder rule. Thus, if a non-Indian had committed the same crime; i.e., the killing of a non-Indian within the reservation, he would not have been subject to the felony murder rule because the non-Indian would have been tried in an Idaho state court.

In sustaining the conviction of the Indian for felony murder, this Court rejected the argument that he was subject to racial discrimination, stating:

> "Federal regulation of Indian tribes, therefore, is governance of *once-sovereign* political communities; it is not to be viewed as legislation of a 'racial group consisting of "Indians".'" [Citing Mancari] (Emphasis supplied) (*Supra* at 707)

Past sovereignty is enough to overcome the equal protection hurdle. More importantly, this past sovereignty provides the basis for a valid exercise of *Congressional* power, but not the basis for an independent exercise of tribal power, unauthorized by Congress. Vestiges of this past sovereignty still exist, but only for the purpose of providing a basis for federal statutes and treaties relating to Indians, which would otherwise be invalid. Such "sovereignty," as

Kagama reminds us, really isn't sovereignty at all.

In *Antelope, supra*, this Court relied on another recent decision which is of special importance because it dealt with the source of the powers of a tribal court. *Fisher v. District Court*, 424 U.S. 382 (1976), involved an adoption dispute between Indians which culminated in a jurisdictional dispute between an Indian court system and a state court system. All parties to the adoption dispute were members of the Northern Cheyenne Tribe and residents of that tribe's reservation in Montana.

This Court held that the tribal court, rather than the state court, had jurisdiction over the adoption proceedings. In so holding the Court found that the denial of access by tribal members to Montana courts for the adoption of an Indian child did not constitute impermissible racial discrimination against the would-be adoptive parents, because the exclusion is based on the jurisdiction of a quasi-sovereign tribe under federal law. The Court found the tribal court's power over the adoption proceedings to be derived from a specific federal statute, 25 U.S.C. 476, and not from any general concept of "tribal sovereignty." Just as in *Mancari*, *Mazurie* and *Antelope*, the concept of tribal sovereignty was used only defensively; i.e., as the basis for sustaining the constitutionality of the exclusive jurisdiction which the Congress had granted the tribal court.

As stated by the Court:

"In 1935, the Tribe adopted a constitution and

bylaws pursuant to § 16 of the Indian Reorganization Act, 48 Stat 987, 25 USC § 476, a statute specifically intended to encourage Indian tribes to revitalize their self-government. Mescalero Apache Tribe, supra, at 151, 36 L Ed 2d 114, 93 S Ct 1267. *Acting pursuant to the constitution and bylaws*, the Tribal Council of the Northern Cheyenne Tribe established the Tribal Court and granted it jurisdiction over adoptions "among members of the Northern Cheyenne Tribe." (424 U.S. at 387)

The Indian Reorganization Act was critical in meeting the arguments against tribal court jurisdiction, because it provided the source of that jurisdiction:

"* * * The Runsaboves [the would be adoptive parents] argue that the ordinances of the Northern Cheyenne Tribe could not deprive the Montana courts of the jurisdiction they exercised over tribal matters prior to organization of the Tribe in 1935. The tribal ordinance conferring jurisdiction on the Tribal Court was authorized by § 16 of the Indian Reorganization Act, 25 USC § 476. Consequently, it implements an overriding federal policy which is clearly adequate to defeat state jurisdiction over litigation involving reservation Indians. Accordingly, even if we assume that the Montana courts properly exercised adoption jurisdiction prior to the organization of the Tribe, a question we do not decide, that jurisdiction has now been preempted." (424 US at 390)

The Court then took up the equal protection issue, referred to the "quasi-sovereign" status of the tribe, and, with a further citation to *Mancari*, upheld the tribal court's exclusive jurisdiction against the constitutional attack.

The pattern established in *McClanahan*, *Mescalero*, *Mancari*, *Mazurie*, *Antelope*, and *Fisher* is consistent: Tribal sovereignty is a concept used by the Court to uphold the power of Congress to treat Indians differently from other citizens but, independent of Congressional action as embodied in a statute or treaty, the concept does not confer legal powers or immunities upon a tribe or its members, and it remains just a "platonic nation" for other purposes. *McClanahan, supra* at 172.

II.

THE DISTINCTION BETWEEN TRIBAL SOVEREIGNTY AND TRIBAL SELF-GOVERNMENT

Tribal "self-government" and "sovereignty" in the traditional sense are not interchangeable terms. The interchangeable use of those terms leads to confusion and resulted in the majority opinion of the circuit court setting forth an invalid premise; i.e., that a tribe has all the traditional elements of "sovereignty" except as limited by federal law.

Tribal self-government refers to a tribe's authority over its own members, whereas traditional sovereignty is an exercise of jurisdiction over a territorial area and all persons within it. These concepts are discussed in Cohen, *Handbook on Federal Indian Law*, (Univ. of New Mexico Ed.) pp. 358-360. Quoting from a ruling by the Solicitor of the Interior Department, April 27, 1939, it is there noted that

we must "* * * beware of reading into the measure of this [Indian] jurisdiction the common-law principle of territoriality of criminal law." *Supra* at 360. In establishing the source and scope of the Indian tribe's authority for self-government which derives from

> "* * * the unextinguished fragments of tribal sovereignty, it must be recognized that this sovereignty is primarily a personal rather than a territorial sovereignty. The tribal court has no jurisdiction over non-Indians unless they consent to such jurisdiction. Its jurisdiction is solely a jurisdiction over persons." (*Supra* at 360)

This critical distinction, which the solicitor warns us not to overlook, was completely disregarded by the majority opinion in the court below.[5]

The emphasis upon personal rather than territorial is also reflected by the following quotations:

> "If, then, an Indian court is to be considered a judicial organ of Indian tribal sovereignty, he must recognize that this sovereignty is not strictly territorial sovereignty, but primarily a personal sovereignty." (*Supra* at 361)

> "Ordinarily offenses committed by a non-Indian against a non-Indian in the Indian country are of no concern to the Federal Government and are punishable by the state. For purposes of criminal jurisdiction, where Indians are not involved, an Indian reservation is generally considered to be a portion of the state within which it is located." (*Supra* at 365)

[5]To an American lawyer "sovereignty" which is only "personal," and not "territorial," is a strange sort of sovereignty. Indeed, it is not "sovereignty" at all, and is best described as what it really is, "tribal self-government," extending only to tribal members.

This distinction between territorial and personal sovereignty — i.e., between true sovereignty and tribal self-government — was recognized but not verbalized by this court in *United States v. McBratney*, 104 U.S. 621 (1882). The defendant, McBratney, killed Casey, neither of whom was an Indian, within the boundaries of the Ute Indian Reservation in Colorado. Notwithstanding the fact that the offense occurred within the reservation, this court held that the state of Colorado had jurisdiction over the offense and that the state court was the proper forum for the criminal proceeding.

The rationale for this conclusion was more explicitly stated in *Draper v. United States*, 164 U.S. 240 (1896). Within the Crow Indian Reservation in Montana, Draper, who was not an Indian, killed another non-Indian. When Montana was admitted to the Union, its enabling act provided that:

> "Indian land shall remain under the absolute jurisdiction and control of the Congress of the United States * * *" (*Supra* at 244)

This court, after considering whether that provision in the enabling act created a jurisdictional enclave within the state of Montana within which Montana statutes could not apply, stated:

> "It follows that a proper appreciation of the legislation as to Indians existing at the time of the passage of the enabling act by which the State of Montana was admitted to the Union adequately explains the use of the words relied upon, and demonstrates that in reserving to the United States jurisdiction and control over In-

dian lands *it was not intended to deprive that state of power to punish for crimes committed on a reservation or Indian land by other than Indians or against Indians.* * * *" (Emphasis supplied) (*Supra* at 247)

More recently, in a situation similar to the Port Madison Indian Reservation in this proceeding, this court considered the Allegheny Reservation in New York, having a population of approximately 9,000 with only eight Indian families. Donald Ray was convicted in New York state court for a murder within the reservation. Neither Ray nor the victim was an Indian. The contention was rejected by this court in *New York ex rel Ray v. Martin*, 326 U.S. 496 (1946), that the state lacked jurisdiction over the offense. The court concluded that the state of New York had jurisdiction, even within the boundaries of the reservation, over crimes committed by non-Indians against non-Indians.

These three cases have been cited not to establish the state's jurisdiction over non-Indians for criminal offenses, which is already well-established, but rather to reflect that in all three cases this Court found that the reservation was within the territorial limits of the respective states. Thus, the states had a territorial jurisdiction to the extent that the same was not preempted by the United States. The limited nature and extent of the United States' preemption of jurisdiction in those cases is consistent with the concept of tribal jurisdiction over tribal members and their property. If the tribal interest had been con-

ceptualized as territorial rather than personal jurisdiction these cases would have presented a conflict between tribal and state jurisdiction. The resolution in all three cases that the state had jurisdiction over crimes committed by non-Indians against other non-Indians within the boundaries of an Indian reservation was a clear recognition of territorial jurisdiction by the state in contrast to a personal jurisdiction of the tribe over its members.

The concept of personal jurisdiction over tribal members without specific Congressional authorization is reflected in decisions of this Court. In *U.S. v. Quiver*, 241 U.S. 602 (1916), two members of the Sioux Tribe were charged in federal court with having committed adultery within the reservation. In dismissing on the basis of the lack of federal court jurisdiction for a prosecution under federal law, this Court stated, *supra* at 603-604:

> "At any early period it became the settled policy of Congress to permit the personal and domestic relations of the Indians with each other to be regulated, and offenses by one Indian against the person or property of another Indian to be dealt with, according to their tribal customs and laws. Thus the Indian Intercourse Acts of 1796 [citation omitted], and * * * 1802 [citation omitted], provided for the punishment of various offenses by white persons against Indians and by Indians against white persons, but left untouched those by Indians against each other, * * *"

While the tribe retained personal jurisdiction over its members, this quotation makes it clear that

the tribe did not have jurisdiction over non-Indians within its reservation — jurisdiction which would have existed if the tribe had territorial sovereignty.

A similar statement was made in *Kagama*, *supra*, at 381-382:

> "* * * They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their *internal and social relations*, and thus far not brought under the laws of the Union or of the State within whose limits they reside." (Emphasis supplied)

This reference to "internal social relations" clearly relates to jurisdiction in the personal sense over tribal members.

The Solicitor of the Department of Interior (77 I.D. 113 (August 10, 1970)) reached the conclusion:

> "* * * Indian tribes do not possess criminal jurisdiction over non-Indians, such jurisdiction lies in either the state or Federal governments." (*Supra* at 115) (The opinion is set forth in the appendix to this Brief, pp. 1A-5A)

Subsequently the opinion has been cited with approval for the lack of tribal criminal jurisdiction over non-Indians. 78 I.D. 229 at 230:

> "* * * the criminal penalties imposed by the [tribal] ordinance would not be applicable to non-Indians, since Indian tribes generally do not possess criminal jurisdiction over non-Indians."

This view is fully in accord with an opinion of

the Attorney General of the United States which was issued contemporaneously with the signing of the Treaty of Point Elliott (12 Stat. 927) with the Suquamish and other tribes in Washington. That opinion (7 Op. AG 174 (May 23, 1855)) stated that the Choctaw Tribe did not have criminal jurisdiction over a non-Indian even though he lived with the tribe and was married to a tribal member. However, in a dispute, between the father and children following the death of the Indian spouse, over Indian property which under tribal law was the property of the deceased Indian spouse was within the tribe's jurisdiction. This reflects tribal jurisdiction over tribal members and their property, since as noted under tribal law all of the property was that of the tribal spouse.

The majority opinion in *Oliphant*, *supra*, refers to 77 I.D. 113 having been withdrawn as of January 25, 1974, but it is not noted in Sheppard's citations nor are any reasons cited for withdrawal. We submit the opinion is correct and is consistent with the concept that a tribe's self-government only extends to its own members unless expressly expanded by Congressional action.

III.

THE JUDICIAL FOUNDATION OF PLENARY CONGRESSIONAL POWER OVER INDIANS IN *WORCESTER V. GEORGIA* AND THE CONGRESSIONAL EXERCISE OF THAT POWER IN PRESERVING LIMITED TRIBAL SELF-GOVERNMENT

The leading case often cited for the proposition that an Indian tribe possesses the attributes of a sovereign power is *Worcester v. Georgia*, 31 U.S. 515 (1832), authored by Chief Justice Marshall. Before discussing that decision, another decision by Justice Marshall in the preceding year must be noted, *The Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

The State of Georgia had extended its laws to Cherokee Indian areas and had annulled tribal ordinances, the practical effect being to parcel out Indian lands. The tribe brought an original action in the United States Supreme Court against the State of Georgia. In ruling upon that application for original jurisdiction, the court determined that the Cherokee Tribe was not a "state" nor was it a "foreign nation" within the supreme court's original jurisdiction provided by Article III, § 2 of the United States Constitution. Although the Cherokees were referred to as being a nation, the court made clear that they were not a foreign nation and they were not to be equated with a state of the Union which possesses sovereign powers.

The following year, in *Worcester, supra*, a jurisdictional dispute between the federal government and the State of Georgia was presented. Worcester, a missionary from the State of Vermont, pursuant to a license issued by the United States government was active in missionary activities within the Cherokee area. The State of Georgia purported to regulate by statute those individuals who could live within the Cherokee Indian country. Thus, the case clearly presented a conflict between an action specifically authorized by the United States government and denied by the state government. Justice Marshall, consistent with his earlier opinions, favored the national power over that of the state and thus found that the State of Georgia was interferring with intercourse with the Cherokee Nation, which was exclusively reserved to Congress by the United States Constitution, Article I, § 8. While the court referred to the Cherokee Nation, and referred to its sovereignty, it is important to note that the United States' treaty with the Cherokee specifically permitted the Cherokee Tribe to exercise sovereign powers to govern its members and all persons within its territory. *Supra* at 538. Thus, the sovereignty which Justice Marshall made reference to was one which was specifically conferred by an action of the United States government, and was not some form of inherent sovereignty that can be relied upon by the tribe as authority to exercise all the powers of a sovereign.

Consistent with our earlier discussion, infra pp.

8-17, *Worcester* does not judicially recognize full blown tribal sovereignty to support the exercise of tribal powers, but rather it reflects the validation of a power exercised by the United States which is justified by the existence of the Cherokee Tribe. This construction of *Worcester* is consistent with the modern pronouncements of this Court wherein *Worcester* has been considered. For example, in *McClanahan*, *supra* at 172, "* * * the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption."

This is also consistent with the 1934 Indian Reorganization Act (48 Stat. 984) which this court observed in *Mancari*, *supra*, at 547:

> "* * * was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically, * * *"

When the Wheeler-Howard Indian Reorganization Bill was introduced in 1934 (HR 7902 and S 2755, 73rd Congress, 2nd Sess.), it included the following specific power for tribes organizing under that bill:

> "to organize and act as federal municipal corporations, to establish a form of government, to adopt and thereafter amend a constitution, and to promulgate and enforce ordinances * * * and [to exercise] any other function customarily exercised by local government."

Notably no such provision was included in the revised bill (S 3645) which was subsequently enacted

as the 1934 Indian Reorganization Act. Why would Congress even consider specifically granting such sovereign powers to a tribe if the tribes already possessed them? The answer is simple. The draftsmen of the measure were attempting to create such powers but Congress refused to accede to that request. See, 70 Mich. Law Rev. 955 (1972), and 51 N.D. Lawyer 600, at 612-613 (1976).

A similar Congressional view is evidenced by the 1968 Indian Bill of Rights which is part of the 1968 Civil Rights Act (PL 90-284). The object of the Indian Bill of Rights was to protect individual Indians who were tried for offenses in tribal court as they were already protected by the Constitutional Bill of Rights in state and federal courts. Representative Reifel observed that the object was "first, to create a Bill of Rights for the protection of Indians tried by tribal courts, * * *" (114 Cong. Rec. 9111)

Senator Erwin who sought to incorporate the full constitutional Bill of Rights as part of the act noted in his report that he "* * * sought to extend constitutional rights to the American Indians * * *" (1968 U.S. Code Cong. & Ad. News at 1864) and Congressman Meeds noted at 114 Cong. Rec. 9596 with reference to the 1968 Indian Bill of Rights "the provisions of the Bill of Rights are not identical to the Federal Constitutional Bill of Rights, and the differences are largely in order to accommodate tribal customs."

All of these and other comments in the Con-

gressional Record reflect a concern with protecting Indians from abuses by tribal court—none mention any concern with non-Indians. The reason is obvious. Congress believed that the tribal courts did not have criminal jurisdiction over non-Indians.

IV

CONSTITUTIONAL BILL OF RIGHTS

This Court has previously held that the constitutional Bill of Rights does not apply to tribal court proceedings (*Talton v. Mayes*, 163 U.S. 376 (1896)) and to the extent that a modified version now applies, it is due to the passage of PL 90-284 (1968). If the Court concludes that tribal court has criminal jurisdiction over non-Indians, we believe that this Court's decision in *Reid v. Covert*, 354 U.S. 1 (1957), is pertinent to the present litigation. Two cases were combined. Mrs. Covert killed her husband, an Air Force sergeant, while stationed at a military base in England. In the companion case, Mrs. Smith killed her husband, who was in the United States Army, at a military post in Japan. Both of these spouses were tried in military court for the homicides. Congress had explicitly provided in the Code of Military Justice that such spouses were subject to the jurisdiction of the military court. Further, the United States had an executive agreement with Britain and with Japan which provided that the U.S. military courts had exclusive jurisdiction over U.S. military and their dependents (*supra* at 15). In considering the *Reid* case, this Court observed:

> "* * * In view of our heritage and history in the adoption of the Constitution and the Bill of Rights, it seems peculiarly anomolous to say that trial before a civilian judge by an independent jury picked from the common citizenry are not fundamental rights." *Supra* at 10.

Further,

> "* * * The most transcendant privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals." *Supra* at 9-10.

This Court concluded that the constitutional rights of United States citizens protect them from actions by the United States government even when our citizens are abroad. Considering the constitutional right to a jury trial which is not available under the military code of justice, the court found that the federal legislation which attempted to make military dependents subject to the military court was invalid. The court further considered the executive agreements with Great Britain and Japan, which also provided for U.S. military courts having exclusive jurisdiction over military dependents. The court observed that treaties (i.e., the executive agreements) had to meet the same constitutional standards that would apply to the federal government insofar as their impact upon American citizens. Thus, those agreements could not be used as a basis for conferring jurisdiction upon the military courts. We believe that it is consistent with the

Reid decision to conclude that the United States government could not, by treaty with Indians within the territorial limits of the United States, provide that those tribal entities would have jurisdiction to criminally try non-Indians for acts that occurred within the reservation.

We submit that it would be equally improper under the *Reid* decision to conclude that the United States government in executing treaties with the Indian tribes could by indirection, i.e., simply making no mention in the treaties, accomplish that which would be impermissible for specific inclusion, i.e., the conferring of jurisdiction upon the Indian tribes to try non-Indians in Indian forums for criminal offenses.

CONCLUSION

The most recent federal court decision cited by both the majority and the dissent relative to the jurisdiction of an Indian tribe over non-Indians is a decision in 1878, *Ex parte Kenyon*, 14 Fed. Cas. 353 (C.C.W.D. Ark.) Kenyon had been convicted in the Cherokee tribal court for larceny and sought by habeas corpus to challenge the jurisdiction of that tribal court. Kenyon had been married to a Cherokee for six years and had lived on the reservation during that marriage. Upon his wife's death, he left the reservation taking with him a horse that had belonged to his wife. He was charged in tribal court with the removal of that property. The federal court recognized that there was a possibility that Kenyon

had become a member of the Cherokee tribe by virtue of his marriage and his living on the reservation. Nothwithstanding that possibility, the court concluded that at the time of his arrest, he was a resident of Kansas and of the United States and was not a tribal member either by not having become one or, if so, he had abandoned that status. The court concluded he was therefore not subject to tribal jurisdiction since tribal courts only have jurisdiction over tribal members committing an act against another tribal member.

While the *Kenyon* case is not a decision of this Court, it has represented the law on this subject for nearly 100 years. As we previously indicated, that ruling is consistent with the 1855 opinion of the Attorney General of the United States, consistent rulings by the solicitor of the Department of Interior, the understanding of Congress in enacting Indian legislation, and with the views expressed by this Court in prior opinions, including *Kagama*. As a result, there has not been litigation in which a tribe has sought to assert criminal jurisdiction over a non-Indian for an act occurring within a reservation. As both the majority and dissent indicated in *Oliphant*, this decision by the Ninth Circuit now finding such jurisdiction to exist is new, novel and without precedent. We further submit that if such jurisdiction is found to exist, it presents the constitutional problems discussed with reference to *Reid v. Covert*, wherein the full protections of the constitutional Bill of Rights would be denied to American citizens.

We respectfully submit that the Ninth Circuit decision should be reversed.

DATED this 8th day of September, 1977.

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I hereby certify that on this 8th day of September, 1977, three copies of Brief of Amicus Curiae Attorney General, State of Washington, were mailed, postage paid to Robert H. Bork, Solicitor General, Room 5143 Justice Building, Washington, D.C., and to each of the following:

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CRIMINAL JURISDICTION OF INDIAN TRIBES OVER NON-INDIANS

Indian Tribes: Generally—Indians: Criminal Jurisdiction: Law and Order—Statutes

Indian tribes generally do not possess criminal jurisdiction over non-Indians unless there still remains in force a treaty provision whereby a tribe acquired "exclusive jurisdiction over such offenses" as provided by section 1152, Title 18, United States Code. While that reference to exclusive tribal jurisdiction still appears in section 1152, it is doubtful that any such jurisdiction has survived since, though initially some treaties may have granted criminal jurisdiction over non-Indians, later treaty provisions usually required the tribes to seize and surrender offenders to designated Federal officials.

M-36810 August 10, 1970

To: SECRETARY OF THE INTERIOR.

Subject: CRIMINAL JURISDICTION OF INDIAN TRIBES OVER NON-INDIANS.

You requested, by furnishing this office a copy of your memorandum of March 9, 1970, to the Vice President, that we review the problems of state taxation on Indian reservations and tribal jurisdiction over non-Indians. We have undertaken in this memorandum a review of tribal criminal jurisdiction over

non-Indians.[1] We will consider the state taxation matter in a later memorandum.

The question of criminal jurisdiction of an Indian tribe over a non-Indian was ruled on in *Ex parte Kenyon*, 14 Fed Cas. 353 (No. 7720) (C.C.W.D. Ark., 1878). The court in that case denied tribal jurisdiction of a Cherokee court over a non-Indian accused of theft. Citing Revised Statutes of 1873, section 2146, the Court of *Kenyon* stated in part:

> * * * if there was any crime committed, at any time, it was committed not only beyond the place over which the Indian court had jurisdiction, but, at the time it was committed, by one over whose person such court did not have jurisdiction; because to give this court jurisdiction of the person of the offender, such offender must be an Indian, and the one against whom the offense is committed must also be an Indian.[2]

Revised Statutes Section 2146, *supra*, provides:

[1]It should be noted that the question of tribal jurisdiction discussed in this memorandum relates to action by tribes in the exercise of remaining sovereign authority and does not relate to Courts of Indian Offenses which are courts established by the Secretary and by the provision of 25 CFR Part 11 exercise over Indians only. See *United States v. Clapox*, 35 Fed. 575 (D.C. Ore. 1888). Further, not all Indian groups organized under the Indian Reorganization Act, 48 Stat. 987, retained sovereign authority if they were not recognized as sovereign prior to being reorganized. See *Federal Indian Law*, Interior Department (1958), p. 411, fn. 36. In organizing under written constitutions most tribes have limited criminal jurisdiction of their laws and courts to Indians.

[2]*Accord, Ex parte Morgan*, 20 Fed. 298, 308 (D.C.W.D. Ark (1883)) also based upon construction of R.S. Sec. 2146. Though this and the 1855 opinion of the Attorney General, *infra*, suggest that Indian tribes do not have jurisdiction over members who commit offenses against non-Indians, the practice and interpretation given Section 1152, United States Code, Title 18, has been to recognize jurisdiction of tribes over offenses by tribal members against non-Indians. See *Federal Indian Law*, Interior Department (1958) pp. 447-448; 55 I.D. 14, 58.

> Sec. 2146 The preceding section [extending the general laws of the United States to Indian country] shall not be construed to extend to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offense, is or may be secured to the Indian tribes respectively.

Section 2146 derived from section 25 of the Act of June 30, 1834, 4 Stat. 729, 733.[3] Section 25 of the 1834 Act was construed by the Attorney General as excluding criminal jurisdiction over non-Indians. See 2 Op. Atty. Gen. 693 (1834) at page 695:

> * * * the 25th section of the act of the 30th of June, 1834, declares that so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country; with a proviso, that the same shall not extend to crimes committed by one Indian against the person and property of another; thus evidently proceeding on the supposition that, under the treaties in relation to the Indian country west of the Mississippi, the Indian laws would only be applicable to Indians themselves.

See also 7 Op. Atty. Gen. 174 (1855) at page 179:

> * * * the Choctaws express a wish in the treaty that Congress would grant to the Choctaws the right of punishing, by their own

[3]That section reads as follows:
"Sec. 25. *And be it further enacted;* That so much of the laws of the United States as provided for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country: *Provided*, The same shall not extend to crimes committed by one Indian against the person or property of another Indian."

> laws, "any white man" who shall come into the nation, and infringe any of their national regulations (Art. 4). But Congress did not accede to this request. On the contrary, it has made provision, by a series of laws, for the punishment of crimes affecting white men, committed by or on them in the Indian country, including that of the Choctaws, by the courts of the United States. (See act of June 30, 1834, iv Stat. at Large, p. 729, and act of June 27, 1844, v. Stat. at Large p. 680.) These Acts cover, so far as they go, all crimes except those committed by Indian against Indian.

Section 2146 was incorporated in Section 1152 of Title 18, United States Code.[4]

Where the provisions of a statute are carried forward and embodied in a codification in the same, or substantially the same words, the latter provision is considered a continuance of the former statute and of the policy and the interpretations given that statute. 82 C.J.S. *Statutes* sec. 276. It is my conclusion, therefore, that unless there still remains in force a treaty provision whereby a tribe acquired "*exclusive jurisdiction over such offense*" as provided by Section 1152, Indian tribes generally do not possess criminal jurisdiction over non-Indians.

Though the statute, 18 U.S.C. sec. 1152, retains

[4]See reviser's note. Section 1152, Title 18, U.S. Code provides:
"Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
"This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."

that reference to exclusive tribal jurisdiction acquired by treaty it is doubtful that any such jurisdiction which may have been vested in a tribe has survived. It is interesting, in this regard, to note that the Cherokee treaty of 1791, 7 Stat. 39, included this provision:

> If any citizen of the United States, or other person not being an Indian, shall settle on any of the Cherokees' lands, such person shall forfeit the protection of the United States, and the Cherokees may punish him or not, as they may please.

That provision was amended by the treaty of February 27, 1819, 7 Stat. 195, which provided that "white intruders" were to be proceeded against by the United States in accordance with the provisions of the Trade and Intercourse Act of 1802, 2 Stat. 139. Similarly, though by the provisions of some early treaties required tribes to seize and surrender trespassers or "badmen" to designated Federal officials. While we have not made an exhaustive survey of treaties with respect to provisions granting criminal jurisdiction over non-Indians, and therefore subject to the possibility that in a rare instance such jurisdiction may have survived, the answer to the question posed by the members of the National Council on Indian Opportunity must be that Indian tribes do not possess criminal jurisdiction over non-Indians, such jurisdiction lies in either the state or Federal governments.

MITCHELL MELICH,
Solicitor.